EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
JAN 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

No. 86-1050

LOUIE L. WAINWRIGHT, etc., et al,

Petitioners

v.

EARNEST LEE MILLER & WILLIAM RILEY JENT,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI OF RESPONDENT JENT

ELEANOR JACKSON PIEL
36 West 44th Street
New York, N.Y. 10036
(212) 575-0797
Attorney for Respondent
William Riley Jent

TABLE OF CASES

Case	Page
Brady v. Maryland, 373 U.S. 83, 86 (1963)	3
Brolan v. U.S. 236 U.S. 216 (1915)	6
Conway v. Adult Authority 396 U.S. 107 (1969)	5
Davis v Alaska, 415 U.S. 308 315-318 (1974)	3
Farrell v. O'Brian, 199 U.S. 89,100 (1905)	6
Gardner v. Florida, 430 U.S. 349 (1977)	3
Lockett v. Ohio, 438 U.S. 586, 604. 606 (1978)	3
Malloy v. Hogan, 378 U.S.1, 8 (1964);	3
Mooney v. Holahan, 294 U.S. 103, 112,113 (1935)	3
O'Dell v. Espinoza, 456 U.S.430 (1982)	5
Southern Railway Co. v. Gadd 233 U.S. 572 (1915)	6
United States ex rel Brown v. Lane, 232 U.S. 598 (1914)	6
Woodson v. North Carolina 428 U.S. 280, 302 (1976)	3
Young v. Regan, 337 U.S. 235,240 (1949)	3

Preliminary Statement

This is a brief in response to a Petition for Writ of Certiorari submitted by the Attorney General of the State of Florida to review a decision of the Eleventh Circuit which reversed a district court denial of the Writ of Habeas Corpus to two death sentenced prisoners convicted of murder in Pasco County, Florida. In reversing the district court on three different constitutional claims, the Court of Appeals remanded the cases to the district court to apply a different legal standard in reconsideration of these three issues.

In addition to the grand jury issue raised here, the court below ordered the district court to reexamine its denial of the ineffective assistance of counsel claim made by both petitioners and as to Respondent Miller only, to reexamine whether mitigating testimony was properly excluded from consideration by the state sentencing judge. The court below further noted that there was "new activity" [a new habeas corpus petition filed after the notice of appeal to the Court of Appeals] which could require the district court to consider additional issues in the light of the old issues which had been before it. Thus there is no final ruling on any of the issues involved, and any consideration of the claims by this Court would be premature.

There is even a more compelling reason, however, for this Court to deny the Petition for Certiorari because it is based on

untrue factual assertions by the petitioner.

The Claimed Issue Presented

As phrased by respondent, the issue posed in this petition concerns the propriety of ordering a review of grand jury minutes in camera of three eye witnesses to the murder by the district court judge where, says respondent, "There is no Specific Claim Before it That The Testimony Contains Material the Disclosure of Which is Mandated by the Fourteenth Amendment or any Other Amendment Working Through It."

As is shown in the attached Respondent Jent's Appendix (RA) containing the relevant pages from petitioner Jent's Petition for Habeas Corpus (RA-1-9), from his request to District Judge Carr to reconsider the claim that petitioner was entitled to the use of the grand jury minutes at trial (RA-11-24) and from the brief he submitted to the Eleventh Circuit on the issue (RA-25-30), it is clear that petitioner has attempted to mislead this Court in posing the question.

In his summary of his argument in his Petition for Habeas Corpus, Jent stated:

> "The petitioner was denied his right of confrontation and the ability to fully impeach the state witnesses, a constitutional correlary to a fair trial [citing cases]. The trial court's denial of the Motion for Access, without even agreeing to review the transcripts in camera, abridged petitioner's Sixth Amendment right to confront the three central witnesses against him...It also abridged petitioner's Eighth Amendment right to obtain possible evidence in mitigation of a possible death sentence." (RA-2,3)

In the body of the Petition, Jent said:

> "Petitioner thus showed a compelling need for the transcripts of these key witnesses. He asserted that access to them in this case was necessary to assure rights of due process and effective confrontation of witnesses under the United States Constitution." (RA-6,7)

and again,

> "Hubbard, Frye and Tirikaine all made prior exculpatory statements. If these witnesses made exculpatory statements before the grand jury, the State had an obligation under the Fifth Amendment to disclose their grand jury testimony to petitioner."(RA-9)

It is clear that Jent invoked the Fifth, Sixth and Eighth Amendments to the Constitution in connection with his claim that he was denied due process under those Amendments which were made applicable to the state of Florida by the Fourteenth Amendment. Thus the statement of the issue which asserted that neither Jent nor Miller had invoked the "Fourteenth Amendment or any other Amendment working through it" is in error since the claims made here of violations of petitioner's due process rights as expressed in the Fifth, Sixth and Eighth Amendment were such as were guaranteed to him by the Fourteenth Amendment. See Mooney v. Holahan, 294 U.S. 103, 112,113 (1935); Young v. Regan, 337 U.S. 235,240 (1949); Malloy v. Hogan, 378 U.S.1, 8 (1964); Lockett v. Ohio, 438 U.S. 586, 604. 606 (1978); Woodson v. North Carolina 428 U.S. 280, 302 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Davis v Alaska, 415 U.S. 308 315-318 (1974); Brady v. Maryland, 373 U.S. 83, 86 (1963).

REASONS THE PETITION SHOULD BE DENIED

1. The petition should be denied because it falsely alleges that

respondents made no appropriate constitutional claim below and did not request the District Court to inspect the grand jury minutes in camera.

a. Respondent Jent has set forth above the specific references to his constitutional rights, which he claimed were denied to him because of his specific need for the grand jury testimony of the witnesses who testified against him.

The Court of Appeals for the Eleventh Circuit has noted in its opinion that witnesses testifying against the defendants at trial had recanted their testimony since the filing of the their appeal to that Court (A-96) giving further support to Jent's contention that adverse testimony was forced from the unwilling prosecution witnesses and that their grand jury testimony could give further support to this contention.

b. Contrary to the allegations of the state, that neither Jent nor Miller "sought discovery of this material (grand jury testimony) in the district court nor asked the district court to conduct its own in camera review of the testimony," Jent indeed requested the district court to make an in camera inspection of those minutes. Proof of this is to be found in the Respondent's Appendix in a written Memorandum in Support of Motion for Reconsideration (RA-24) and in allegations set forth in Jent's brief on appeal in the Court of Appeals (RA-26,28,29). Nor is it significant that the request may have been made only by Jent since the cases were consolidated for hearing on the issues which

were joint and each of the convicted defendants was given the advantage of the other's arguments where applicable (RA-31).

2. The petition should be denied because the order of the Court of Appeals is not a final order or disposition of the case and accordingly, if there were an issue to be decided by this Court, it is not ripe for review. See O'Dell v. Espinoza, 456 U.S.430 (1982)

a. The case is presently pending before the district court and that court has ordered that the minutes of the grand jury be reviewed and is presently in the course of reviewing them. A stay sought of this action by the petitioner in this Court was denied as was a request to stay the mandate in the Court of Appeals.

3. The petition should be denied because the record does not present the question the petitioner claims is before the Court.

a. There is clear evidence that the Habeas petitioners did make a constitutional argument before the courts below, and that they did ask the district court to look at the grand jury minutes of the eye witnesses in camera and thus there is no evidence to support the question the state petitioner here poses if arguendo it were an appropriate question for consideration by this Court. In Conway v. Adult Authority 396 U.S. 107 (1969), this Court refused to rule on a "purely artificial" issue and called the request to do so an "unjustificable intrusion upon the time of this Court."

4. The petition should be denied because the issue advanced is frivolous. Where it is clear that the issue is wanting in merit in every respect as is clear here, this Court has not hesitated to reject a petition or an appeal on the grounds that it is frivolous. See Farrell v. O'Brian, 199 U.S. 89,100 (1905); United States ex rel Brown v. Lane, 232 U.S. 598 (1914); Brolan v. U.S. 236 U.S. 216 (1915).

Penalty Should Be Assessed against Petitioner

As has been set forth above, the petition in this case is so utterly without merit as to suggest that it is made only for purposes of delay and that a penalty should be imposed against the state petitioner for misrepresenting the facts to this Court and taking up the time of counsel and the Court in a completely meritless cause. See. Southern Railway Co. v. Gadd 233 U.S. 572, 581 (1915).

CONCLUSION

This Court should deny the petition and enter an appropriate order sanctioning the petitioner for the advancing of a frivolous petition replete with misstatements of fact.

Respectfully submitted,

ELEANOR JACKSON PIEL
36 West 44th Street
New York, N.Y. 10036
(212) 575-0797

Attorney for respondent
William Riley Jent

January 7, 1987

CERTIFICATE OF SERVICE

I, ELEANOR JACKSON PIEL, Counsel for Respondent Jent, and a member of the Bar of the United States Supreme Court, hereby certify that on the 8th day of Jannuary, 1987, I served one copy of the Brief in Opposition to Petition for Certiorari on Davis G. Anderson, Assistant Attorney General, 1313 Tampa Street, Tampa, Florida 33602, Howardene Garrett, Assistant Public Defender, Room 202, Pasco County Courthouse, 705 E. Liveoak, Dade City, Florida 33523, David L. Roll, Esq. Steptoe & Johnson, 1330 Connecticut Ave., N.W., Washington, D.C. 20036 and to Alan Wagner, Esq., Carlton Fields, P.O. Box 3239, Tampa, Florida 33601 by a duly addressed envelope with postage prepaid.

ELEANOR JACKSON PIEL
Attorney for Respondent Jent

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

No. 86-1050

LOUIE L. WAINWRIGHT, etc., et al,

Petitioners,

v.

EARNEST LEE MILLER & WILLIAM RILEY JENT,

Respondents.

RESPONDENT JENT'S APPENDIX

PAGE

Excerpts from Jent Petition for Habeas Corpus.....RA-1

Excerpts from Jent Memorandum in Support of Motion for Reconsideration of Court's Opinion and Order of April 30, 1984.....RA-11

Excerpts from Brief of Petitioner-Appellant Jent in Eleventh Circuit Court of Appeals.....RA-25

Excerpts from Transcript of Hearing in District Court July 18, 1984.....RA-31

THIS IS A CAPITAL CASE
EXECUTION IS SCHEDULED FOR
7:00 a.m., TUESDAY,
JULY 19, 1983

Prisoner's Name — William R. Jent
Prison Number
Place of Confinement — Florida State Prison, Starke, Florida

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM RILEY JENT,

PETITIONER,

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; CHARLES G. STRICKLAND, JR., Superintendent of Florida State Prison, Starke, Florida; and JIM HUNT Attorney General of the State of Florida,

RESPONDENTS.

Civil Action No. 83-860-CIV-T-13

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

RE 7

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

SUMMARY

1. William Riley Jent, petitioner, attacks the judgment of conviction for first-degree murder and death sentence entered against him by the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida. The Court is located in Dade City, Florida. Petitioner's execution is now scheduled for 7:00 a.m. on Tuesday, July 19, 1983.

2. Petitioner here raises five issues under the United States Constitution which are substantial and which have been exhausted in the state courts of Florida:

a. Petitioner was denied access to transcripts of grand jury testimony of the three central witnesses of the State. The only direct evidence linking petitioner to the crime, or to the aggravating circumstances on which the death sentence was based, came from those three witnesses. Both, however, had given prior exculpatory and other statements inconsistent with their testimony at trial. In these circumstances, petitioner made a showing of compelling need for the transcripts. The petitioner was denied his right of confrontation and the ability to fully impeach the state witnesses, a constitutional correlary to a fair trial. See Jencks v. United States, 353 U.S. 657 (1957); Palermo v. United States, 360 U.S. 343 (1959); Goldberg v. United States, 425 U.S. 94 (1976). The trial court's

RE 6

denial of the Motion for Access, without even agreeing to review the transcripts in camera, abridged petitioner's Sixth Amendment right to confront the three central witnesses against him. See David v. Alaska, 415 U.S. 308 (1974). It also abridged petitoner's Eighth Amendment right to obtain possible evidence in mitigation of a possible death sentence. See Eddings v. Oklahoma, 455 U.S. 104 (1982). A new trial should be granted with access to these transcripts.

b. The trial judge denied the petitioner the benefit of affirmative alibi testimony by permitting a witness subpoenaed to a deposition to plead the Fifth Amendment when the State had already entered into a plea bargain with the witness which would, upon sentence, immunize her against prosecution. The refusal of the court to grant petitioner continuance of the trial or to move forward the witness' sentence further denied him the affirmative testimony(as was to later appear by the witness' affidavit attached to the post-conviction collateral relief motion not before this Court at this time) and accordingly deprived petitoner of the due process under the Fourteenth Amendment. See Washington v. Texas, 388 U.S. 14, 19 (1967), United State v. Hammond, 598 F.2d 1008, 1012 (5 Cir. 1979).

c. Prejudicial purported expert testimony on hair analysis was permitted over objection which improperly

[Carroll], R 2441 [Marvin].*

11. It was after Carroll heard on the radio the finding of a burned girl that Carroll told Tina Marvin to "sell everything we can, we're leaving" (R 2438 [Marvin]) and so they left town a day or so later and went to Michigan in the 1967 blue Buick Sabre which Bobby Dodd had sold to Carroll on July 12, and Carroll had given to Tina Marvin when he returned from the night out with Carroll (R 2443 [Marvin]).

Ruling

At the conclusion of the hearing for a new trial, the court denied the motion in its entirety.

The Court's Findings

The judge found that aggravating circumstances existed--the murder was especially heinous. In making this finding, he relied in part on evidence at petitioner's trial that the victim, prior to being ignited, attempted to get up and was knocked back down, as well as on evidence concerning the rape

Direct Appeal

1. Petitioner appealed the conviction and sentence to the Supreme Court of Florida, raising several issues, including the following:

---

* A milk jug had been noted at the scene where the body was found in which traces of gasoline were found (R 1510, R 1517, R 1534).

a. That the trial court erred by failing to provide him with transcripts of the grand jury testimony of three eyewitnesses;

b. It was error to refuse a continuance to defendant who sought to depose a material witness prior to trial. That witness, who had an insulating plea bargain already negotiated with the prosecutor, was able to plead the Fifth Amendment because her sentence was deferred until after the defendant's trial.

c. The evidence was inherently incredible and the court was asked to reweigh the evidence and enter a different verdict.

d. It was an abuse of discretion to permit the introduction into evidence of a hair sample found near the scene of the crime three days later on the basis of an "expert" witness who found a similarity between the unknown sample and a hair from the petitioner's head.

e. The court erred in refusing to bar cameras from the courtroom at the request of the defendant's counsel.

f. The fact that the deceased was never identified improperly subjected the petitioner to double-jeopardy.

g. The denial by the court of the new trial based on the newly discovered evidence was an abuse of discretion.

RE 26

Supporting Facts

1. Petitioner predicated his defense upon the lack of credibility of Hubbard, Frye, and Tirikaine, the three eyewitnesses against him. Their testimony was central to the State's case and demand for the death penalty, but all had made unsworn and inconsistent statements to the police, including an exculpatory statement that they had not witnessed any killing. (R at 690, 693-94, 699, 1207-10, 1553.) All had reason to fear that they could be prosecuted for their own roles. (R 693-694, 1208.) Frye at one point was arrested as an accessory after the fact, while Hubbard was in protective custody when she first told the story she recounted at trial. All women appeared before the grand jury under oath at a time when the events in question were fresh in memory.

2. Prior to trial, petitioner's counsel moved for production of transcripts of the grand jury testimony of the State's three central witnesses, Glinna Frye, Patricia Tirikaine, and Carlena Jo Hubbard. (R 215-17.) The motion cited deposition testimony showing that the three witnesses in question had previously given different versions of the events, and that one had acknowledged receiving promises of leniency from the State in return for her testimony in this case. (R 216.) Petitioner thus showed a compelling need for the transcripts of these key witnesses. He asserted that access to them in this case was necessary to assure rights of due process and effective confrontation of witnesses under the

United States Constitution. (R at 217.)*

3. The State objected to the motion, claiming that the defense was on a "fishing expedition" and cited the generalized interest in grand jury secrecy. (R at 2132-35.) During argument on the motion, petitioner's counsel requested that the trial court at least review the transcripts in camera before denying the motion. (R at 2130-32.) The court denied the motion saying only that "a sufficient predicate" (showing of need) had not been made. (R at 2138.)

4. The State's case on both guilt and sentencing derived from the testimony of the two witnesses concerned. Indeed, the aggravating factor on which the trial court based petitioner's sentence of death under Florida's death penalty statute (heinous crime) was supported solely by testimony from the ~~two~~ three witnesses in question.

5. The Florida Supreme Court summarily affirmed the decision to withhold the grand jury transcript ruling that (a) the defendant had failed to lay "a proper predicate" for the testimony based on something other than surmise about the testimony's contents, and (b) the defense's subsequent attack on the credibility of the State's witnesses by cross-

---

* Moreover, grand jury testimony in Florida differs from other witness statements. Like Fed. R. Evid. 801(d)(1), on which it is modeled, the Florida statute exempts prior sworn statements from the hearsay rule. Fla. Stat. Ann. § 90.801 (2) (a). Thus, prior grand jury testimony can be considered by the jury for the truth of the matter asserted.

examination "obviated that need for their prior [grand jury] testimony." Jent v. State, 408 So. 2d at 1027-28

Legal Bases for the Claim

6. While the Constitution may not guarantee an ordinary criminal defendant access to grand jury transcripts of his chief accusers, different considerations apply where the ultimate penalty of death is sought--and where the Eighth Amendment therefore comes into play. The unique nature of capital punishment imposes a correspondingly unique need for reliability in the determination that death is the appropriate penalty in a particular case. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion of the Chief Justice); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Justice Stewart). As the Supreme Court reiterated just last week, "[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, No. 81-1893, slip op. at 5-6 (U.S. July 6, 1983).

7. These Eighth Amendment considerations apply to the determination of guilt or innocence of a defendant charged with a capital offense--and certainly to the proof of any aggravating factor on which the subsequent death sentence is based. Cf. Gardner v. Florida, 430 U.S. 349, 359 (1977).

8. In this case, the trial court has prevented a defendant from presenting to the sentencer (jury and sentencing judge) evidence potentially relevant to the other side of the

sentencing equation--the aggravating factors relied on by the State. By erecting an insurmountable barrier between grand jury transcripts and defendants facing a death penalty, the Florida courts have precluded such defendants from making one type of challenge to the evidence asserted in support of death.

9. The denial to petitioner of access to the grand jury testimony of the State's principal witnesses also infringes his Sixth Amendment rights. The decision in United States v. Augenblick, 393 U.S. 348, 356 (1969) suggests that in a proper case, the failure to produce a prior statement of a prosecution witness in a state criminal proceeding may violate the Sixth Amendment. See Palermo v. United States, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring). Also, the Supreme Court previously has held that a state's generalized interest in the secrecy of juvenile court records does not outweigh a burglary defendant's Sixth Amendment right fully to test the credibility of the chief prosecution witness. Davis v. Alaska, 415 U.S. 308 (1974).

10. Hubbard, Frye, and Tirikaine all made prior exculpatory statements. If these witnesses made exculpatory statements before the grand jury, the State had an obligation under the Fifth Amendment to disclose their grand jury testimony to petitioner. Brady v. Maryland, 373 U.S. 83 (1963).

11. In this case the State's opposition to petitioner's request for access to the grand jury transcript was solely based on its generalized interest in grand jury secrecy. By contrast, the defendant in a capital case has the most

compelling interest imaginable in testing the credibility of the witnesses against him--his life. A holding that the Constitution affords less protection to a defendant in a capital case than to a defendant indicted for burglary is irreconcilable with Davis v. Alaska, supra.

12. Here, petitioner was denied a central weapon for his defense: sworn transcripts of the three witnesses who provided the only evidence linking petitioner in any way with the crime or with the aggravating circumstance on which his sentence of death was based. The trial judge even refused to look at the transcripts in camera--though under Florida law the transcripts could have been introduced at trial for the truth of the matters asserted therein.

II. The Denial by the Trial Judge of a Continuance of the Trial so Defense Counsel Could Take the Deposition of Samantha Carver, a Person Identified by the Three Testifying Trial Witnesses as Having Been Present With Them the Entire Evening During Which the Crime Took Place Deprived the Defendant of his Due Process Rights to a Fair Trial

Supporting Facts

1. Defense counsel subpoenaed Samantha Carver to a deposition on December 13, 1979, four days before the trial of petitioner was to commence. Since she had not testified for the State and was supposedly present all through whatever occurred on July 12-13, 1979, he had reason to believe her testimony would be favorable. On that same day she entered a plea of nolo contendere pursuant to a plea bargain which provided:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

----------X

WILLIAM RILEY JENT,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, et al.,

Respondents.

----------X

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF COURT'S OPINION AND ORDER OF APRIL 30, 1984

ELEANOR JACKSON PIEL
Attorney for Petitioner
36 West 44th Street
New York, N.Y. 10036
(212) 575-0797

appends a timetable listing of the events as "Exhibit A" to demonstrate how this miscarriage of justice occurred.

II

This Court has Misappraised Petitioner's Contention that He was Deprived of Due Process by Reason of the Court's Denial to Him of the Transcripts of the Grand Jury Testimony.

This Court has mistakenly interpreted petitioner's contention to be that the claimed constitutional deprivation involving the denial to him of the grand jury transcripts of the three witnesses who testified against him at trial (and/or a perusal of same by the court) is based on a "federal constitutional right to the discovery of grand jury transcripts".

Throughout this habeas corpus petition, the petitioner has affirmatively alleged under oath and with the support of his counsel, that the state has frightened witnesses into perjured testimony before the court. It is this contention that raises this issue to Constitutional proportions, and requires at the very least that this Court review those grand jury minutes in camera to finally determine that these charges must be true, based on what counsel believes to be further gross inconsistencies in the witnesses' first testimony under oath concerning the alleged murder by petitioner.

Based upon the patent inconsistencies in the testimony of the three eye-witnesses at trial -- inconsistencies between their prior deposition testimony (as to Glenna Frye, inconsistencies between deposition testimony taken in September and then again in December and again at trial) and inconsistencies among the witnesses' testimony -- it is petitioner's position that the trial testimony was perjured and that the perjury was solicited by the state.[2] It was secured by the state by keeping all three in "protective custody" from July 1979 through the trial in December 1979 (a period of six months) (R 632, 643-645, 852) and by threatening each of them with the charge of accessory to a murder if their testimony was not satisfactory. Although this Court has considered petitioner entitled to a hearing because of allegations of threats to Tina Marvin and Elmer Carroll, it has not noted the record references at the trial to the prosecution's threats made to each of the so-called three eyewitnesses: Glenna Frye testified under oath that prior to her testimony which incriminated Jent, she was being held on the "criminal charge of

2. Moreover, this Court may take notice of inconsistencies in the testimony of the witnesses in the Jent trial as compared with the testimony of some of the same witnesses at the trial of defendant Miller whose separate trial is also before this Court.

accessory after the fact to a murder" (R 642). Carlena Jo Hubbard was threatened by Detective Fitzgerald, that if she did not talk, "you'll be an accessory or something like that or something to a murder" (R 293).[3] The other detective, Jack Armstrong, put the threats to Patricia Tirikaine, who testified that she would be charged as an "accessory" [to a murder] if she did not help him (R 540). Similar threats were made to a non-testifying witness, Samantha Carver who, because she did not testify against Jent and Miller, was charged with the crime of accessory after the fact to murder (CR 45, 46). See infra for further discussion of this witness.

The inconsistencies in the testimony of the three witnesses, dramatically attest to the fact that they were not and could not be telling the truth. In order to make this clear to the Court, petitioner will here detail some of the inconsistencies to show that they should have alerted the trial court to make the grand jury testimony available to defense counsel and should alert this Court at last to do so.

The unreliability of the testimony along with its inconsistencies is one time more described in detail in order to

---

3. The threat must be read as meaning that each of these women were expected to say that Jent (or Jent and Miller) had committed this crime of murder, even if it were not true.

show this Court that availability of the grand jury minutes -- to show what the witnesses said in August 1979 about their memory of what happened in July 1979 -- was crucial both to test the witnesses' veracity and to show the prosecutorial misconduct which pervaded the whole state proceeding, viz.:

Even without considering the disability of these witnesses -- owing to their self-confessed and otherwise established incapacity brought on by alcoholism, drug addiction or mental illness as set forth in the Supplemental Memorandum (p.7) -- the glaring contradictions in their testimony cast grave doubt upon its truth and probative value. This required that the record be searched for all their testimony given under oath. Each of them told the police two and sometimes three versions of the story, sometimes implicating Jent, other times attesting to his innocence. We do not know how they handled this in the grand jury. Each of them eventually said (it is submitted here as the result of threats) that Ernie Miller and William Jent, beat up "Tammy" and burned her body, but beyond those facts, they could agree on virtually nothing.

The contradictions began from the moment "Tammy" arrived on the scene. These inconsistencies are germane to the consideration of whether any "Tammy" came to the alleged party or indeed was ever killed by petitioner. See infra. Ms. Tirikaine swore

that "Tammy" came to the Caboose Bar that night with Glenna Frye and Ernie Miller (R 473, 474). But Ms. Frye said she never saw "Tammy" at the bar (R 648, 649). Ms. Hubbard could not make up her mind one way or the other (R 247, 248). And in a pre-trial deposition, Ms. Tirikaine contradicted herself and said "Tammy" wasn't with anyone at the bar (R 749).

All three witnesses claim to have been driven by Ernie Miller from the bar to the site where "Tammy" was beaten.

Ms. Frye claimed a man named "Johnnie" was also in the car (R 659). Ms. Hubbard said not "Johnnie" but "George" went with them (R 248). Both said "Tammy" wasn't in the car. But Ms. Tirikaine swore "Tammy" was in the car (R 476). If they actually witnessed "Tammy's" murder, which we here submit they did not, they should have remembered if they had just been in the car with her.

Glenna Frye claimed "Tammy" arrived at the river in a white van driven by a man named "Big Bob" (R 666). Ms. Hubbard said she didn't see "Tammy" until she was being beaten (R 258, 259). Ms. Tirikaine stated "Tammy" arrived in Ernie Miller's car with the three state witnesses mentioned above (R 476). What did they say before the grand jury?

Ms. Frye testified she had never met "Tammy" before she arrived at the river (R 648), but Ms. Tirikaine said that

Ms. Frye and "Tammy" were friends (R 551).

Pat Tirikaine also said that Glenna Frye and George Mortola smoked marijuana on the way out to the river (R 478). In another contradiction, Ms. Frye testified that they had no marijuana and told of an unsuccessful trip to Dade City in search of the drug (R 656, 662).

When the group first arrived at the river, Ms. Frye said that she and Ernie Miller let the others out of the car and went back to Miller's to take some more crystal tea (R 663, 664). Ms. Hubbard testified, however, that Miller parked the car and everyone got out (R 251).

Once these witnesses finally agreed that they were all present at the river, they disagreed again. All could agree they had some source of lighting at the river. Ms. Tirikaine said it was a fire (R 482). Ms. Frye said the only light was candles they had brought and spread around (R 672, 673). Ms. Hubbard says there was a fire (R 247). What did they each tell the grand jury about the visibility?

Even the crucial testimony concerning the beating differs. Ms. Frye says "Tammy" was on the ground during the entire incident (R 676-681). Ms. Hubbard swore that Jent and Miller held "Tammy" up and hit her (R 260, 261). Ms. Tirikaine

said "Tammy" was down on a blanket (R 489, 490). Ms. Hubbard never mentioned seeing either man using a stick to hit "Tammy". Ms. Tirikaine said only Jent used a stick (R 500, 501). But Ms. Frye says she looked for and found a stick for Ernie Miller, gave it to him and saw only Miller use it (R 678).

When the group left the river, none of the witnesses saw what happened to the girl that supposedly had been beaten. As they drove away, Ms. Frye said the group saw the white van she mentioned stuck in the mud and stopped to push it out (R 685-687). Neither Ms. Tirikaine nor Ms. Hubbard remembered this incident, and both claim not to have seen a white van at all that evening (R 267, 268, 504).

All three witnesses agreed that the group went back to Ernie Miller's house after leaving the river. But their versions of what took place there as sworn to in their depositions were incredibly different. What was their testimony before the grand jury?

Glenna Frye and Pat Tirikaine, in their first depositions told of the group going in the house, staying there while Frye took a bath and Tirikaine got sick (R 688, 689, 506-508). Ms. Hubbard testified differently -- that the rest of the group waited in the car while Ernie Miller ran in the house to get something.

She claimed the entire stop lasted only "a couple of seconds" (R 268, 269). Almost three months later (after the Miller trial, his conviction and the jury recommendation of life imprisonment) two of the three were sworn and deposed again. This time the stories changed. Ms. Frye told a graphic tale of "Tammy" being taken from the trunk of the car and raped by Miller, Jent and two other men (R 2729). Ms. Hubbard told of being in an almost dream-like state, remembering disjointed bits and pieces. She seemed to know what she was supposed to say, but for some reason she had difficulty with it. Specifically, she said:

> "I can't say I saw all them screwing that girl, I can't say that. . . All I can say is that I can see flashes of it, you see what I'm saying, just like I don't know how to explain it (pausing) - now I can see Ernie, you know, doing something to this girl, but it's kind of hazy." (R 774)

Pat Tirikaine, the only one of the three to tell the same version of the stop at Ernie's in all of her statements, testified that no rape took place (R 760). She was not called as a witness in the prior Miller trial.

After the group allegedly left Miller's house, all three witnesses told of driving to the Richloam Game Preserve and there seeing "Tammy's" body burned. But once again, only some of the crucial incriminating testimony was given by all

three. When they arrived, Ms. Frye said they all immediately got out of the car and followed Miller and Jent to the rear of the car. She said they all stood and watched as Miller lifted "Tammy" from the trunk (R 693, 694). Ms. Tirikaine said only Miller and Jent got out of the car initially. The others waited in the car a few minutes until they saw two men carrying "Tammy" past the car towards the front; they they got out (R 515). Ms. Hubbard said they waited in the car a few minutes but when they finally got out, Miller was still around back of the car (R 273). During the first set of depositions, none of the three said anything about seeing any signs of life from the body of "Tammy" at the Game Preserve. Nor did anyone say that Jent struck "Tammy" there. During her second deposition, Ms. Frye testified for the first time that "Tammy" tried to stand up just before she was burned, and Bill Jent struck her (R 2739). Neither Ms. Hubbard nor Ms. Tirikaine, both of whom stood close by, saw this event (R 756, 793). How was this handled in their grand jury testimony

In additional testimony in another criminal case, Florida v. George Mortola, 79-867, Glenna Frye testified on December 19, 1979 before Judge Ray E. Ulmer at a trial[4] in Pasco

4. A copy of Ms. Frye's testimony at this trial secured since the July 12, 1983 hearing is attached as "Exhibit B" and referred to here as "B" followed by page number.

County that the events she described took place on July 14 and that she had continouusly since about then been kept in jail. She testified at that trial that early that morning she went to the river with Ernie Miller, George Mortola, Bill [Jent], Samantha [Carver], C. J. [Hubbard], Johnny [?], Ricky [Camancho] and Patricia [Tirikaine] and that she saw a girl named "Tammy" there who came with "Tampa Bill" (B 4, 5). She saw a fight there between "Tammy" and the two petitioners (B 6).

Contrary to the testimony she had just given the day before in the Jent trial about the rape which followed, she said they then went to Ernie's house for "a short time" (B 9). There was no mention whatsoever of the rape she had testified to on December 18, 1979, the day before, when she said that George Mortola was the one who went "second" in the raping of "Tammy" (R 1660, 1651). She also mentioned nothing about "Tammy" becoming conscious just before she was burned and being hit by Jent as she said it had happened in her testimony of the previous day (R 1673, 1674), (B 10).

At the Mortola trial, Ms. Frye admitted that she had never told the state about any murder until she had been promise a "deal" which involved immunity from prosecution and that

Detectives Armstrong and Fitzgerald had threatened her with headlines in the newspaper "Glena Frye to fry" (B 24).

The usefulness and materiality of the grand jury testimony, which must involve still another version of the facts, in order to show what the witnesses said had happened barely a month after the event is self-evident. Against the background of the serious accusation of prosecutorial misconduct, the minutes became imperative.

In this connection (prosecutorial misconduct) additional evidence was adduced at the post-trial Rule 3.850 hearing through the testimony of Leonard Holton, petitioner's trial lawyer, that he (Holton) was prevented from speaking with Glenna Frye during the course of the trial by the active interference of the prosecutor's office and a criminal threat against him (Holton)[5] (CR 1062). Holton testified to this at the Rule 3.850 hearing in pertinent part as follows:

> Holton: "There was an incident involving Glenna Frye. I had been given reason to believe that she might have different testimony for us in

---

5. This testimony was adduced under the claim of ineffective counsel and was at least some evidence that the state had interfered with counsel's advocacy by threatening and attempting to intimidate such counsel.

Mr. Jent's trial from what she offered in Mr. Miller's trial. [CR 1061]

- - - -

I went to the State Attorney's office. I don't know why I thought she was there -- maybe I had some information she was there . . . I located her in the State Attorney's office and I attempted to speak with her. Mr. Cope, who is one of the prosecutors in the case, interceded and prevented -- in fact, ordered me not to speak to her, ordered me to leave the office . . . . she appeared to be visually upset and with the information I had received I thought I should try to speak with her. [CR 1062]

- - - - -

She was shuffled into a room in the prosecutor's office, the door was closed. I attempted to enter the room. I was advised not to enter the room. I was then threatened with arrest for Trespass if I did not leave their office at that time.

Q Who said that to you?

A Charles Cope [One of the prosecutors]." (CR 1063)

Counsel for petitioner submits that the above testimony received in evidence without objection or denial at the Rule 3.850 hearing from Leonard Holton, a lawyer and officer of the court under oath, establishes cogent basis for petitioner's claim of prosecutorial misconduct at the trial of the case before the issue raised by the affidavits of Tina Marvin or Elmer Carroll

ever got on the record. Moreover, in view of this evidence, this Court has an obligation to at least review the grand jury testimony of the so-called eyewitnesses in camera and further to order an additional hearing to determine whether that interference with the defense of the defendant Jent in the middle of his trial as testified to by his lawyer did not amount to prosecutorial misconduct in itself warranting a new trial for petitioner. This is a request that this Court reconsider petitioner's first claim for relief and grant a hearing on the larger issue of prosecutorial misconduct in connection with improper pressure on the three testifying witnesses and in that connection review their grand jury testimony as well as other statements taken by the prosecution and never previously revealed to defense counsel.

III

The Prosecution's Dealing with Samantha Carver Wanted as a Witness for the Defense is Further Evidence of Prosecutorial Misconduct.

Petitioner seeks reconsideration of this Court's ruling on the impropriety of the trial court's refusal to continue the trial in order to obtain Samantha Carver's testimony.

This reconsideration is sought in connection with the

IN THE

United States Court of Appeals

For the Eleventh Circuit

No. 85-3185

WILLIAM RILEY JENT,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; CHARLES G. STRICKLAND, Jr., Superintendent of Florida State Prison, Starke, Florida; and JIM SMITH, Attorney General of the State of Florida,

Respondents-Appellees.

On Appeal from the United States District Court
for the Middle District, Tampa Division

BRIEF FOR PETITIONER-APPELLANT
(HABEAS CORPUS)

ELEANOR JACKSON PIEL
Attorney for Petitioner-Appellant
36 West 44th Street
New York, New York 10036
(212) 575-0797

Point IV

THE DENIAL OF THE GRAND JURY TESTIMONY TO DEFENSE COUNSEL OF THE THREE "EYEWITNESSES" DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION AS WELL AS HIS GUARANTEE OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

Jent's counsel made a pretrial written demand for the transcripts of the grand jury testimony of the three eyewitnesses who had testified against the defendant before the grand jury. Their depositions had been taken in September 1979, a month or so after they had testified about events which took place in July 1979.

The specific request made clear with record references to the depositions taken, the particularized need for the grand jury testimony, invoked the relevant Florida law on the subject (F.S. 905.27) and requested the transcripts in the interest of the defendant's due process rights (R 203-205)*.

This Court has had recent occasion to examine the issue and policy of grand jury secrecy as it affects public policy in In re Petition to Inspect Grand Jury Materials, 735 F.2d 1261 (11th Cir. 1984). This Court made clear there that other factors in

---

* The request read in pertinent part:
"a) On September 18, 1979, your undersigned took the deposition of GLINNA FRYE. During deposition she admitted to previously telling at least two (2) significantly different versions of the happenings on the night in question (different than her testimony at deposition). See transcript of deposition of GLINNA FRYE, pages 63, 64, 65. GLINNA FRYE also acknowledged being the beneficiary of certain promises of leniency from the state in return for her testimony in this case.
b) On September 18, 1979, your undersigned took the deposition of PATRICIA TIRIKAINE. During that deposition she admitted to making previous statements to law enforcement officers that were grossly inconsistent with her testimony at the deposition (see transcript of deposition of PATRICIA TIRIKAINE, pages 62, 63, 65, 66).
c) On September 21, 1979, your undersigned took the deposition of CARLENA JO HUBBARD. During that deposition she admitted to making previous statements to law enforcement officers that were grossly inconsistent with her testimony at the deposition (see transcript of deposition of CARLENA JO HUBBARD pages 68, 69, 70, 71, 72, 73).
8. F.S. 905.27 provides for the disclosure of testimony of witnesses before the grand jury for the purpose of "ascertaining whether it is consistent with testimony given by the witness before the court" or for the purpose of "furthering justice." In this case there appears a substantial likelihood that these witnesses' Grand Jury testimony will differ from that given this court at trial.
9. The granting of this Motion will insure that the defendant is accorded his rights to due process,and effective confrontation of witnesses as guaranteed by Article I, Sections 9 and 16 of the Florida Constitution and the Fifth,Sixth & Fourteenth Amendments to the U.S. Constitution." (R 204).

the interests of justice may outweigh the long established policy of grand jury secrecy. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218, 219 (1979); United States v. Procter & Gamble Co., 356 U.S. 677, 681, 682 (1958); United States v. Sells Engineering, Inc., 463 U.S. 418, 443 (1983) [disclosure permitted upon a showing of particularized need]. See United States v. Luizzo, 739 F.2d 541 (11th Cir. 1984) [disclosure permitted under Jencks Act after testimony at hearing or trial of witness and when so directed by court preliminary to or in connection with a judicial proceeding where there is showing of particularized need]. cf. United States v. Baggot, 463 U.S. 476, 483 (1983) [no disclosure permitted for a non-litigation function].

The showing made by Jent's counsel involved promises by the prosecution of leniency to all the witnesses and a representation that their versions of the event were mutually inconsistent and that each witness had given the state different versions of the events. Thus counsel had established a compelling and particularized need for the transcripts to assure the rights of due process and effective confrontation. Moreover, he argued that in a capital case his due process claim becomes even more important in order to assure the correct imposition of the ultimate penalty. See Lockett v. Ohio, 438 U.S. 586, 604, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Gardner v. Florida, 430 U.S. 349, 359 (1977).

Petitioner argued that failure to produce a prior statement of a witness upon request violates a defendant's Sixth Amendment right to effective advocacy and interferes with his right to adequate cross-examination. See United States v. Augenblick, 393 U.S. 343, 362, 363 (1969); Palermo v. United States, 360 U.S. 343, 362 (1959); cf. Jencks v. United States, 353 U.S. 657 (1957), Dennis v. United States, 384 U.S. 855 (1966).

The American Bar Association standards for Criminal Justice (Second Edition 1982) Standard 11-2.1(iii) provides that the

prosecutor upon request shall provide to defense counsel

> "(iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of witnesses."

The notes on the section refer to "developments in the trend toward liberalizing access to grand jury minutes." This section has been recommended by the National Prosecutors Standards, NDAA, National Prosecution Standards 13.2(A)(3), by the National Advisory Commission Standards, NAC, Courts 4.9(2) and by the Uniform Rules of Criminal Procedure, NCCUSL, Uniform Rules of Criminal Procedure 421(a).

Commencing with Alford v. United States, 282 U.S. 687, 691 (1931) and before, courts have held that the cross-examination of a witness is a matter of right and a part of due process; there must be liberal lee-way permitted to the cross-examiner in the exercise of that right. Certainly the prior testimony of a witness before a grand jury testifying to the same or similar facts to what he or she will testify to at trial is relevant data for the cross-examiner to review. There is a conflict in the law of the fifty states as to whether the grand jury testimony of a witness at trial is required to be turned over to defense counsel after that witness has testified and whether a particularized showing is necessary before such a rule comes into play. (See Annotation 20 ALR 3rd 1. and pocket parts for a comprehensive survey of such rulings). Counsel asserts here that disclosure of the testimony was his constitutional due process right.

Moreover, in the case at bar, all the witnesses testified to having given prior exculpatory statements and had denied that a murder had taken place. If these statements were made or suggested before the grand jury there would be additional grounds under Brady v. Maryland, supra. See United States v. Bagley, __U.S.__ (July 2, 1985) for the production of that testimony. See Galtieri v. Wainwright, 582 F.2d 348, 352 (5th Cir. 1978 en

An adequate showing of the serious impairment of the defendant's rights can not be made until the grand jury testimony is actually produced.

Petitioner had asked the state court and the court below to review the testimony in camera. At the very least, petitioner has a right to have a court preliminarily review the grand jury minutes to determine whether petitioner's speculations are correct. See United States v. Morris, 582 F.2d 436 (5th Cir. 1976).

The court below nonetheless concluded on this issue that

> "... petitioner has failed to show with particularity the usefulness or materiality of the grand jury transcripts. The prosecution stated that the transcripts did not contain any exculpatory information. The fact that the grand jury testimony is alleged by the petitioner to contain some inconsistencies does not without some factual support, convince this Court that the trial court abused its discretion in deciding not to review the transcripts in camera" (CFH 385).

The above quotation from the court puts counsel in a Catch-22 position. There is no way defense counsel can tell the court what details might be found in the grand jury testimony of the alleged eyewitnesses to the murder since that testimony is secret. It is reasonable to assume that one serious inconsistency must appear — concerning Glinna Frye's testimony on the subject of the rape. Such testimony was omitted by her in her deposition taken September 18, 1979, not mentioned at the Miller trial, but first developed at a subsequent deposition in Jent on December 5, 1979 (R 2711-2758). She did not relate it earlier, she said, because she was afraid (R 2750, 2751). What did she say at the secret grand jury session where her testimony was supposedly protected?

In a record fraught with incidents of claimed prosecutorial misconduct, neither court nor counsel can rely on the blanket representation of the state attorney that there is no exculpatory information in those transcripts.

Although it is misconduct for a prosecutor to fail to disclose evidence favorable to an accused, in view of the secrecy here of the minutes, petitioner may be executed with only a suspicion and in ignorance of the

existence of such misconduct. cf. United States v. Schaflander, 119 F.2d 1024, 1026 (9th Cir. 1983).

In this case the prior request of defense counsel for this information mandates at the very least, that the court examine the minutes of the testimony of the three witnesses before the grand jury to determine in fact, the relevance of that testimony for impeachment in cross-examinaton and further to determine whether it is Brady material. cf. Maddox v. Montgomery, 718 F.2d 1033 (11th Cir. 1983).

Point V

THE TRIAL COURT'S DENIAL OF A CONTINUANCE OF THE JENT TRIAL FOR THE PURPOSE OF DEPOSING SAMANTHA CARVER DENIED AND INTERFERED WITH JENT'S CONSTITUTIONAL RIGHT TO CALL A WITNESS IN HIS DEFENSE. THE COURT BELOW MISAPPRAISED THE FACTS AND LAW IN THIS CONNECTION

To the state court on direct appeal and to the court below petitioner contended that the trial court had abused its discretion in refusing a continuance to defendant so that he could have the benefit of the deposition testimony of Carver who had been named by all the other eyewitnesses as a person present at the scene of the murder involving the defendants (CFH 24-26).

Petitioner also submitted an affidavit of Carver attached to his Rule 3.850 motion in the trial court supporting his request for a hearing on the issue of prosecutorial misconduct and suppression of exculpatory evidence (CR 83, 84). See Point II, supra .

The district court below ruled that the refusal of the state court judge to grant a continuance of the Jent trial until Samantha Carver had been sentenced on her nolo contendere plea (to being an accessory after the fact to a murder, and her deposition ~~Amendment~~ Taken) was not an abuse of discretion (CFH 387).

The court correctly noted that Carver "entered into a plea agreement with the state immediately before the petitioner's trial but was

sides and then if I let you reopen as to that, I will consider it at the time. But I'm not in a position to determine whether the probative value of that is so necessary and needed so that it would outweigh many of the factors in Rule 403 that the Court should consider.

Now, also -- let's take up one other matter. You have not made such a motion, Ms. Garrett. Would you like to adopt a procedure, the two of you, that you automatically adopt any motion of the other unless you opt out?

MS. GARRETT: Yes, Your Honor, I would care to adopt that procedure.

MS. PIEL: I concur.

THE COURT: Would you like to do the same for the State, Mr. Anderson?

MR. ANDERSON: Absolutely, Your Honor.

MR. KOTLER: Yes, Your Honor.

THE COURT: All right, I will consider any objection made by either party, since this is a joint hearing, to be automatically adopted by the other party unless you opt out at that time.

Now, the only other pending motion, unless you can point out some other, is a motion made on behalf of Jent for some sort of order of protection of the State prisoner Carroll. Again, I'll take that under consideration at this point and we'll see how things go, but I would not anticipate